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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. ~~502~~ 27

UNITED STATES OF AMERICA,

Appellant,

vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, AND MILWAUKEE ROAD COMMUTERS' ASSOCIATION

Appellees.

No. ~~503~~ 28

INTERSTATE COMMERCE COMMISSION,

Appellant,

vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, AND MILWAUKEE ROAD COMMUTERS' ASSOCIATION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

MOTION TO AFFIRM

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Now comes the Appellees, State of Illinois and the Illinois Commerce Commission and pursuant to Rule 16, paragraph 1(c) of the Revised Rules of the Supreme Court respectfully move that the judgment of the District Court

be affirmed on the ground that the questions raised by the Appellants are so insubstantial as not to require further argument.

STATEMENT OF THE CASE.

This is a direct appeal from the judgment of a statutory three Judge District Court entered on June 14, 1956, pursuant to 49 USCA 17(9) and 28 USCA 2321-25. The judgment set aside, annulled and permanently enjoined the enforcement of an order entered by the Interstate Commerce Commission pursuant to an investigation under Section 13(4) of the Interstate Commerce Act in a proceeding entitled "Chicago Intrastate Suburban Fares of the Milwaukee Road".

The Milwaukee Railroad had filed with the Illinois Commerce Commission on July 24, 1952, a petition to discontinue all of its off-peak suburban trains and requested an increase in suburban fares on the remaining trains of approximately 33%, or in the alternative, if the discontinuance of trains was denied, that the suburban fares be raised approximately 73%.[1] The Railroad in that petition claimed an out-of-pocket deficit from the Chicago suburban operations of approximately $1,260,000. The evidence introduced by the Railroad before the Illinois Commission made no claim for any depreciation or maintenance of way expense as constituting a part of the out-of-pocket expense. In the extended hearings before the Illinois Commission, the evidence developed that the operating expenses of the Railroad were inflated and that by converting the suburban operation from steam to diesel locomotives, the Railroad could save approximately $1,000,000 annually which would eliminate any deficit on the

1. Such percentages are the arithmetical derivation from applying the new schedules against the old.

suburban service. Consequently, the Illinois Commission on November 10, 1954 by an appropriate order denied any fare increase to the Milwaukee Railroad.[2]

The rates left in effect by the order of the Illinois Commission were as high or higher than the rates for diesel operated service on the Burlington and Rock Island Railroads, but were somewhat lower than those of the electrified service of the Illinois Central and South Shore and the steam locomotive service of the North Western.

After the denial of any fare increase by the Illinois Commission, the Milwaukee Railroad filed in February 1955, a petition with the Interstate Commerce Commission under Section 13 of the Interstate Commerce Act requesting that Commission to authorize an increase in the suburban intrastate fares upon the basis that the present intrastate fares constituted an undue burden on interstate commerce. In the proceeding before the Interstate Commission, the Railroad introduced different evidence and claimed depreciation and maintenance of way as part of the out-of-pocket expense on the suburban operation which had not been claimed or introduced before the Illinois Commission.

On November 21, 1955, the Interstate Commission issued its report (297 I.C.C. 353) prescribing an increase in the

2. By the end of September 1954, the Railroad had completely dieselized the suburban operation. The report of the Interstate Commission after allowing depreciation and maintenance of way expense of over $250,000 determined that the Railroad's out-of-pocket expense was only $306,038. Thus, the Interstate's report of November 21, 1955, confirmed the finding of the Illinois Commission that dieselization would save approximately $1,000,000 annually. Any failure of the Illinois Commission to take any cognizance of depreciation, on the diesel locomotives themselves, was the absence of any claim or evidence of depreciation being offered by the railroad.

intrastate suburban fares.[3] The report found that the Railroad had an out-of-pocket deficit of $306,038 on the suburban operation and prescribed fares which should result in an increase in revenue of $383,000 "which would eliminate the out-of-pocket deficit and result in a contribution to indirect costs and taxes of approximately $77,000 annually." The report further found that the Milwaukee Railroad earned from its freight operations $37,393,050 (both interstate and intrastate) and suffered a deficit from its passenger operations of $22,824,532 (mostly interstate). *Not one word is found in the report concerning the Railroad's revenue* (other than suburban revenues) *nor any finding or subsidiary statement regarding the contribution that the suburban service should make as its fair proportionate share to the Railroad's income.*

After overruling petitions for rehearing and reconsideration, the report was made final by order entered March 2, 1956 directing the higher prescribed fares to become effective April 20, 1956.

On April 18, 1956, the Appellees filed an action to review the Interstate Commission's report and order pursuant to 28 USCA 1336. The statutory three Judge District Court, after briefs and oral arguments, set aside the order of the Interstate Commission.[4]

3. Some of the prescribed fares were substantially higher than even those proposed by the Railroad. See Table 1 of the Appendix to the Commission's report.

4. The court's opinion is not yet reported but is set forth at pages 13-25 of the Jurisdictional Statement in No. 503.

ARGUMENT.

This appeal does not present any substantial question. The matter pertains to an essentially local situation which has been heard and decided by a unanimous three Judge District Court.

The case, as the Commission's report clearly discloses, is not a "person or localities" discrimination but one of alleged revenue discrimination. The Railroad contended and the report and order of the Interstate Commission found that the intrastate suburban fares created such unjust discrimination against interstate commerce as to justify a Section 13(4) prescription of intrastate suburban fares. The judgment of the lower court is simply that the "justification for the exercise of federal power to nullify state rates does not clearly appear from the record before us."[5] While appellants have assigned questions directed at certain statements in the District Court's opinion, it is the lower court's *judgment* which this court reviews and not the particular statements made in the opinion. *Black* v. *Cutter Laboratories*, 351 U. S. 292, 297.

However, a reading of the court's opinion clearly shows that the court properly reviewed the report and order of the Interstate Commission and rendered its judgment according to pronouncements of this court in *King* v. *United States*, 344 U. S. 254; *North Carolina* v. *United States*, 325 U. S. 507; *Florida* v. *United States*, 282 U. S. 194; *Wisconsin RR Com.* v. *Chicago, B. & Q. RR Co.*, 257 U. S. 563; and the more recent decisions of *Mississippi*

5. As this court stated in *North Carolina* v. *United States*, 325 U. S. 507, at 511: "Before the Commission can nullify a state rate, justification for the 'exercise of the federal power must clearly appear.'"

Public Service Com. v. *United States*, 124 F. Supp. 809, aff'd. 349 U. S. 908, and *State of North Carolina* v. *United States*, 128 F. Supp. 718, aff'd. 350 U. S. 805.

We shall discuss the questions presented by the appellants in the same sequence that they have raised them in their respective Jurisdiction Statements.[6]

I.

The District Court properly criticized the procedure used by the Railroad and correctly held that the State Commission should be afforded the opportunity to fix fares upon the same evidence and basis as the Interstate Commission.

In so ruling, the district court did not go contrary to this court's decision in *Florida* v. *United States*, 282 U. S. 194; nor the decisions in *State of Illinois* v. *United States*, 101 F. Supp. 36, aff'd 342 U. S. 930; and *North Carolina* v. *United States*, 128 F. Supp. 718, aff'd 350 U. S. 805. As we have pointed out in our Motion to Affirm in No. 307 at pages 6 to 9, the instant case is outside the factual scope of those decisions and the lower court did not err in requiring more than mere "way station" consideration be given to the State Commission.

No hardship is present in the requirement of the District Court that the state regulatory body "should have been given a chance to fix rates on the same evidence and the same basis" as the Interstate Commission. Nor does the remandment to the Interstate Commission "for further proceedings not inconsistent with the opinion" tie the

6. The Solicitor General in No. 502 raises only two questions. He does not question the basic reason for the judgment of the lower court, *i.e.* that the Interstate Commission's report failed to make the requisite finding of what contribution the intrastate fares should make as their fair proportion of the Railroad's income.

hands of the Interstate Commission as stated by appellant in No. 503. The Interstate Commerce Act allows joint hearings[7] and the usual procedure in suburban fare cases is to make application before both commissions and have a joint hearing with the same evidence being presented to the two commissions at the same time.[8] A joint hearing was the procedure adopted in *State of Illinois* v. *United States*, 101 F. Supp. 36, aff'd 342 U. S. 930. It is the procedure which has been followed in other suburban fare cases and is presently being followed in *In the Matter of Illinois Central Suburban Fares*, I.C.C. Docket 31944 and Ill.C.C. Docket 43175 and *Commutation Fares, Chicago, North Shore and Milwaukee Railway*, I.C.C. Docket 32043 and Ill.C.C. Docket 43625. The situation involved in the instant matter was ideal for a joint hearing since the railroad sought an adjustment in both intra and inter state suburban fares. Even the Interstate Commission in its report commented upon the departure from the usual procedure of filing petitions with both commissions, "so that like cooperative action could be taken". 297 I.C.C. at page 355.

Not only does the joint method allow the same evidence and presentation to each respective commission, but it affords a saving in time, expense and a quicker decision on the ultimate issues including any discrimination under Section 13(4). The length of time involved in the present Milwaukee Railroad's suburban fare increase case and the admonishment of the District Court not to treat the state Commission as a mere way station rests upon the shoulders of the Railroad. They adopted the procedure and presented the case which has resulted in the present state

7. Section 13(3), 49 USC.

8. It must be kept in mind that this case is not the usual state wide increase of intrastate rates to bring them to the same level as had been prescribed for interstate rates.

of affairs.[9] Upon remandment the Railroad can still use the joint hearing procedure and effectively free the hands of both Commissions while at the same time complying with the mandate of the Court.[10]

II.

The dilemma or question, *if any*, which the decree of the district court casts upon the interstate fares for Zenda and Walworth, Wisconsin, was created by the Railroad and the Interstate Commission itself and does not warrant the time and consideration of this court.

First, an examination of the decree does not establish that the interstate fares are included in the court's injunction.[11] The decree states:

> "1. The order of the Interstate Commerce Commission, dated March 2, 1956 (and the prior report and order dated November 21, 1955, upon which the order of March 2, 1956, was based) entered in proceeding Docket No. 31742, are beyond the power, and are an abuse of authority, of the Interstate Commerce Commission."

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9. In a straight rate hearing, Section 36 of the Illinois Public Utilities Act (Chapter 111⅔, para. 36, Illinois Revised Statutes—1955) limits the total time which the Illinois Commission can suspend a rate increase to ten months.

10. While Section 13(3) does not compel the state to enter into a joint hearing, the Illinois Commission has never refused. What effect a refusal would have should await the time there is that refusal.

11. The opinion of the District Court indicates that only intrastate fares are under discussion as it starts out by saying: "This is an action to set aside * * * an order of the Interstate Commerce Commission authorizing Chicago, Milwaukee * * * to put into effect intrastate rates * * * higher than those authorized by the Illinois Commerce Commission". Appendix A, page 13, of Statement in No. 503. No interstate rates could be authorized by the Illinois Commission.

The decree then proceeds to enjoin "said report and orders" (being the order dated March 2, 1956 and the "report and order dated November 21, 1955, *upon which the order of March 2, 1956, was based*").[12] The decree further states that the Milwaukee Railroad shall return the monies received as excess fares under the order of the court dated April 18, 1956. That order refused the plaintiffs' (appellees here) a temporary injunction upon the condition that the Railroad would impound the excess fares collected "from and after April 20, 1956, pursuant to the order of the Interstate Commerce Commission." The new fares which were to go into effect on April 20, 1956 were only the *intrastate* fares pursuant to the order of March 2, 1956, and not the two interstate fares which had already gone into effect on January 29, 1956.[13] While it is true that the United States and the Interstate Commission filed a motion pursuant to Rule 60(a) of the Federal Rules of Civil Procedure, to amend or correct the decree of June 14, 1956, so as to exclude from the decree the authorized increase in *interstate* fares, they also sought in the same motion to delete from the opinion all statements to the effect that the state Commission should be allowed to fix rates upon the same evidence and basis as the Interstate Commission.[14] The court thereafter denied the motion without expressing any views. The appellants only assume that the decree affects the interstate fares and as pointed out such construction is questionable. The

12. See Appendix B, pages 26-27, of Statement in No. 503 for the full decree.

13. See Milwaukee Railroad's brief page 19 in No. 307.

14. Appellees filed objections to that motion pointing out that Rule 60(a) provides for only correcting clerical mistakes such as an error made by a clerk in transcription. *West Virginia Oil & Gas v. Breece Lumber Co.*, 213 F. 2d 702. We also pointed out that the increase of the two interstate fares was only to correspond with the intrastate increase and if the latter fell the Commission should reconsider its order as to the interstate.

assumption is obviously based upon their own confusion in making the report of November 21, 1955 embrace Dockets Nos. 26550 and 11703 (See 297 I. C. C. 353). However, such report clearly stated that an appropriate order affecting the interstate fares "will be entered" in the 26550 and 11703 dockets (See 297 I. C. C. at 360) which, it would seem, would be separate and distinct from the "report and order dated November 21, 1955, upon which the order of March 2, 1956, was based." We do not feel that this court should be imposed upon at this time to alleviate a questionable assumption which the appellants have presumed. A more appropriate time would be after the issue is directly presented to the District Court for repayment of the impounded funds in the event this court affirms the lower court.

Second, and assuming that the decree affects the two interstate fares, we respectfully submit that such a question is insubstantial. It is clear from the report of the Interstate Commission that the two interstate fares for Zenda and Walworth were not fixed or determined by the Commission as a separate matter, but were determined solely on the basis of the prescribed intrastate suburban fares.[15] Obviously, if the basis for the establishment of the intrastate fares fall, so also the basis for the two incidental interstate fares. Consequently, the District Court would be fully justified in setting aside and annulling the two interstate fares along with the intrastate rates.

III.

The District Court correctly held that the order and report of the Interstate Commission lacked the essential finding that the intrastate rates did not contribute their fair proportionate share of the carrier's total income.

15. Finding 5, 297 I.C.C. at 360.

The fundamental requirement that this court has uniformly maintained is that the intrastate traffic should only pay its "fair proportionate share" of the cost of maintaining an adequate railway system.[16] The Interstate Commission in No. 503 does not disagree with that proposition but contends that the present report and order has met that requirement. It states that the Commission's findings are "the equivalent" to the findings approved in the *King* case and that there is no practical distinction between a fair contribution to indirect costs and return and a fair proportion of total income.[17]

The District Court held the contrary, saying:

> "A fair proportion of a carrier's total income is not the same as a contribution to indirect costs and return on investment. Paying all of the costs of suburban service and, in addition, making a contribution to other costs of the railroad, may well be more than contributing a fair proportion of Milwaukee Road's total income."

The logic of the court's reasoning is clear. The report found that the Railroad had a passenger deficit of $22,800,000 while it earned from freight operations, both intrastate as well as interstate, $37,393,000. Nothing is said as to the total passenger revenue or as to the total revenues from all operations. So far as the report shows the interstate passenger revenue could be zero so that any increase in suburban revenue would naturally reduce the total pas-

16. *Wisconsin* v. *Chicago B. & Q. R. R.*, 257 U. S. 563, 586; *Florida* v. *United States*, 282 U. S. 194, 211; *North Carolina* v. *United States*, 325 U. S. 507, 516; *King* v. *United States*, 344 U. S. 254, 275.

17. The Solicitor General, however, in No. 502 feels that the present report is not the "equivalent" and that there is a practical distinction. He agrees with the decision of the District Court in setting aside the Commission's order for failure to make the required finding.

senger deficit, but does that show a failure of *fair proportionate contribution?*

When this court uses the words "fair proportionate share" there should be some significance given to the words "fair" and "proportionate." There must be something in the findings or subsidiary recitals in the report with which to make comparisons to determine whether the intrastate is contributing its "fair proportionate share." Merely that the intrastate rates on the suburban service "were not remunerative or reasonably compensatory" does not establish the justification for setting aside state rates. *Florida* v. *United States*, 282 U. S. 194, 214. The instant report is totally lacking in facts from which one can make a comparison to determine what would constitute a fair proportionate contribution. The Interstate Commission is again trying to ignore the requirement of the Statute that there must be "*undue, unreasonable,* or *unjust* discrimination against interstate" commerce.[18] The Commission takes the position that the carrier should get its money wherever it can regardless of any discrimination, let alone unjust discrimination. As the report bluntly states:

> "the fact that respondent cannot make a profit or at least so far has been unable to make a profit on its other passenger-train service is no reason for depriving it of an opportunity to make a profit on its suburban operations"

and the addition of the words "if it can be done at lawful fares" does not remove the sting nor the underlying attitude expressed, especially when the so-called "lawful fares" are arrived at without comparing the contributions

18. This court in *North Carolina* v. *United States*, 325 U. S. 507 at 512 cautioned the Commission that Congress intended some meaning and weight to be given the words "unjust discriminati[illegible]" and that the court would not condone an oversimplified form of proof.

made by intra and inter state to determine any "unjust discrimination." Lawful fares in the absence of such unjust discrimination against interstate commerce are those prescribed by the State. The District Court referred to this disregard of fundamentals by saying: "The limitless requirements implicit in the practice just cited from the report are reminiscent of public fund raising campaigns which used as their slogan 'Give till it hurts'." It is time that the brakes were again applied to the loose reports and findings of the Commission. The mere statement that there is undue, unreasonable and unjust discrimination against interstate commerce without reciting facts to support such conclusion should be condemned. The District Court has expressed its censure in holding that "justification for the exercise of federal power to nullify state rates does not clearly appear from the record before us." We respectfully submit that this court should affirm that judgment.[19]

IV.

The District Court has correctly ruled that rates can not be found just and reasonable upon a comparison with the rates of another carrier without showing that the operating conditions of the two carriers are similar.

The appellant, Interstate Commerce Commission in No. 503 (page 11) concedes that the Commission "has held frequently" that rate comparisons on a revenue basis in order to be valid must be based on similarity of transportation conditions and that the Commission in the instant case made

19. We are fully aware of the need of an efficient, strong and adequate national transportation system. However, we also believe that the mass transportation which is involved in these suburban fare cases is equally important to the national interest. The problems of traffic congestion and the large loss of life in traffic accidents require, in the public need, the promotion and continuance of adequate mass transportation commuter service at reasonable rates.

no such comparison.[20] However, the Commission states that the court mis-read the report because the comparison with the North Western's fares was used only for the basis of limiting the Milwaukee rates and that for such purpose, the comparison was proper even without a showing of comparable operating conditions.

If there has been this misinterpretation of the Commission's report, then there is no danger in the District Court's opinion to the effect that rates can not be found just and reasonable upon comparison with the rates of another carrier without first a showing of similarity of operation conditions. The District Court's opinion merely confirms what the Interstate Commission has itself held. Nor is the court's decision erroneous for having mis-read the report by considering the comparison with the North Western to be the basis for determining the reasonableness of the fares. The opinion had already found that the Commission's order should be set aside because it lacked the basic findings for exercising federal jurisdiction,[21] and in the absence of a basic finding to support the order, the District Court did not need to examine the evidence in order to see if the finding of reasonableness was supported by that evidence. *Florida* v. *United States*, 282 U. S. 194, 215; *United States* v. *Chicago M. St. P. & Pac. R. Co.*, 294 U. S. 499, 505.

Consequently, no harm is manifest or of such consequence as to require further argument before this court.

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20. The admission made by the Interstate Commission on the necessity of similarity of operating conditions is not shared by the railroad. The Milwaukee's Statement in No. 307 at pages 10-11 considers the lower court's decision as making it virtually impossible to establish uniform fares because of the impossibility of showing similar operating conditions for any two carriers.

21. Which decision the Solicitor General has accepted in No. 502.

CONCLUSION.

For the foregoing reasons we respectfully submit that the decision of the District Court is correct and these appeals present no substantial question for this court's decision. The judgment of the District Court is simply that the justification for the exercise of federal power does not clearly appear upon the facts in the instant case, and in this determination, the court was correct and its judgment should be affirmed.

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